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In The

Supreme Court of the United States

THE CHICKASAW NATION AND THE CHOCTAW NATION OF OKLAHOMA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF PETITIONERS

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35 pp

TABLE OF CONTENTS

Page

THE INTEREST OF THE AMICUS CURIAE MUSCOGEE (CREEK) NATION 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Special Canons of Construction Concerning Ambiguous Federal Indian Legislation are Based on the Federal Trust Responsibility and Apply to Interpretation of § 2719(b) of the Indian Gaming Regulatory Act 6

II. The Application of the Special Canons of Construction to Interpretation of § 2719(d) Is Consistent with the Overriding Federal Interest in Indian Self-Determination 11

A. Executive Office and Congressional Policy of Indian Self-Determination 11

B. Judicial Adherence to the Federal Policy of Indian Self-Determination 15

C. Statutory Construction of IGRA § 2719(d) in the Context of Indian Self-Determination .. 19

III. The 1988 Indian Gaming Regulatory Act Must Be Considered *In Pari Materia* With the 1988 Amendments of the Indian Self-Determination Act 23

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Board of County Commissioners v. Seber, 318 U.S. 705 (1943), *reh'g denied*, 319 U.S. 782 (1943) 12

Boys Markets v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) 27

Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976) 4, 23

California v. Cabazon Band of Indians, 480 U.S. 202 (1987) 16, 17, 18, 20

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980) 21

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) .. 15, 16

Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 877 (2001) 4, 5

Choate v. Trapp, 224 U.S. 665 (1912) 8

Choctaw Nation v. United States, 210 F.3d 389, *cert. granted*, 1215 S.Ct. 877 (2001) 4

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985), *reh'g denied*, 471 U.S. 1062 (1985) 8

Cramer v. United States, 261 U.S. 219 (1923) 9

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), *reh'g denied*, 431 U.S. 960 (1977) 9

Elernbaugh v. United States, 409 U.S. 239 (1972) 23

Harjo v. Kleppe, 420 F.Supp. 1110 (1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978) 2

TABLE OF AUTHORITIES – Continued

Page

Indian Country U.S.A., Inc. v. Oklahoma Tax Commission, 829 F.2d 979 (10th Cir. 1987), *cert. denied, Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988) 2, 21

Little Six, Inc. v. United States, 210 F.3d 1361 (Fed. Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3497 (2000) 6

McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) 16

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 17

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 5, 23

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 4

Morton v. Mancari, 417 U.S. 535 (1974) 9

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) 2

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 16, 21

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 16, 17, 18

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 16

Seminole Nation v. United States, 316 U.S. 286 (1942) .. 9, 10

Squire v. Capoeman, 351 U.S. 1 (1956) 10

Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue, 295 U.S. 418 (1935) 18

United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Creek Nation, 295 U.S. 103 (1935), *reh'g denied*, 295 U.S 769 (1935) 9, 10

United States v. Kagama, 118 U.S. 375 (1886) 10, 16

United States v. Mason, 412 U.S. 391 (1973) 10

United States v. Rickert, 188 U.S. 432 (1903) 10

United States v. Sioux Nation, 448 U.S. 371 (1980) 9

United States v. Wheeler, 435 U.S. 313 (1978) 15

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) ... 15, 16

STATUTES

American Indian Agricultural Management Act of 1993, Pub. L. No. 103-177, Dec. 3, 1993, 107 Stat. 2011 (codified at 25 U.S.C. §§ 3701, *et seq.*) 13

Indian Employment Training and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, Oct. 23, 1992, 106 Stat. 2302 (codified at 25 U.S.C. §§ 3401, *et seq.*) 13

Indian Energy Resources Act of 1992, Pub. L. No. 102-486, Title XXVI, §§ 260, *et seq.*, Oct. 24, 1992, 106 Stat. 3113 (codified at 25 U.S.C. §§ 3501, *et seq.*) 13

Indian Financing Act of 1974, Pub. L. No. 93-362, Apr. 12, 1974, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451, *et seq.*) 13, 17, 18

Indian Gaming Regulatory Act, Pub. L. No. 100-497, Oct. 17, 1988, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701, *et seq.*) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, Sept. 30, 1976, 90 Stat. 1400 (codified at 25 U.S.C. §§ 1601, *et seq.*) 13

Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461, *et seq.*) 12

Indian Self-Determination Act of 1975, Pub. L. No. 93-638, January 4, 1975, 88 Stat. 2203 (codified in 25 U.S.C. §§ 450, *et seq.*) 5, 12, 17

Indian Self-Determination Act Amendments of 1988, Pub. L. No. 100-472, Oct. 5, 1988, 102 Stat. 2296 (codified at 25 U.S.C. §§ 450a and 450j-1) ..... *passim*

Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, Title II, § 204, October 25, 1994, 108 Stat. 4272 (codified at 25 U.S.C. §§ 458aa, *et seq.*) 6, 13, 14

Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, Dec. 3, 1993, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601, *et seq.*) 13

Internal Revenue Code, Chapter 35, 26 U.S.C. §§ 4401 and 4411 ..... 3, 19

Johnson Act, 15 U.S.C. §§ 1171-1178 27

Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, Oct. 26, 1996, 110 Stat. 4017 (codified at 25 U.S.C. §§ 4101, *et seq.*) 13

Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501, *et seq.*) 12

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

H.Rep. No. 393 and S.Rep. No. 274 100th Cong., 2nd Sess. (1987) *reprinted in* 1988 U.S.C.C.A.N. 2620, 2661-2662, 2626-27, 2645, 2649, 2659 ... 7, 24, 25

S.Rep. No. 205, 103rd Cong., 1st Sess. 3, 4 *reprinted in* 1994 U.S.C.C.A.N. 3488) 14

134 Cong. Rec. 24027 (September 15, 1988) (Statements of Senator Evans, Vice-Chairman of the Senate Committee on Indian Affairs) 22

134 Cong. Rec. H 25377 (September 26, 1988) (Statements of Congressman Udall, Chairman, House Committee on Interior and Insular Affairs) 22

Exec. Order No. 11,399, 33 Fed. Reg. 4,245 (1968) 11

President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983) 11

Exec. Order No. 13084, 63 Fed. Reg. 27,655 (1998) 12

F. Cohen, *Handbook of Federal Indian Law* (1982) 8

Report of National Gambling Impact Study Commission, 104th Cong., 2nd Sess., Native American Tribal Gambling 20

BRIEF OF AMICUS CURIAE MUSCOGEE (CREEK) NATION IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Muscogee (Creek) Nation respectfully submits a Brief Amicus Curiae pursuant to Supreme Court Rule 37.3 in Support of the Petitioners.[1]

THE INTEREST OF THE AMICUS CURIAE MUSCOGEE (CREEK) NATION

The Amicus Curiae herein, Muscogee (Creek) Nation ("Muscogee Nation"), is a federally recognized Indian tribe with its headquarters located in Okmulgee County, Oklahoma. It is one of the "Five Civilized Tribes" (now referred to as the "Five Nations"), a group of Indian tribes which once owned in fee almost all of what is now eastern Oklahoma and which includes the petitioners herein, the Chickasaw Nation and the Choctaw Nation.

Like many other Indian tribes nationwide, the Five Nations eventually lost most of their tribal lands due to Federal advancement of the assimilationist allotment policy of the late 1800's. During the twentieth century, the Muscogee Nation successfully fought to implement its right to self-government and to free itself from Federal

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

and state encroachment of that right. In 1976 the Muscogee Nation established judicial recognition of its survival of "statutory dismemberment" which had occurred during implementation of the Federal assimilation and allotment policies. *See Harjo v. Kleppe*, 420 F.Supp. 1110, 1119 (1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978).[2] In 1988 the Muscogee Nation established its right to operate a tribal judicial system in a case which held that the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501, *et seq.*, impliedly repealed provisions in earlier allotment legislation which expressly "stripped the Tribe of the power to have courts." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989). During this same time period, the Muscogee Nation fought and won a court battle that established that Federal law preempted substantive state regulation of the Muscogee Nation's bingo enterprise and imposition of a sales tax on the bingo enterprise located in Muscogee Nation Indian country. *Indian Country U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d 979, 982 (10th Cir. 1987), *cert. denied*, *Oklahoma Tax Commission v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988).

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[2] The opinion in the *Harjo* case provides a detailed description of the numerous Federal laws affecting the Five Nations which threatened destruction of their governments in order to force them to enter into allotment agreements, the subsequent "bureaucratic imperialism" exercised by the Bureau of Indian Affairs and the persistence of a competent tribal legislative-executive government "throughout more than half a century of the most adverse conditions imaginable." *Harjo v. Kleppe*, 420 F.Supp. at 1119-1143.

The Muscogee Nation operates several class II (bingo) gaming facilities in Oklahoma, employing 338 persons, 49% of whom are Creek citizens and 25% of whom are members of other Indian tribes. The Muscogee Nation's gaming facilities provide an important source of non-federal revenue to fund tribal government operations and programs and services for its Indian citizens. The Muscogee Nation has an interest in this appeal because a decision by this Court has the potential to adversely impact the Muscogee Nation by diminishing the revenue it needs to administer its governmental programs, services and activities. The undersigned Attorney General of the Muscogee Nation has been authorized by the Principal Chief of the Nation to file this Brief of Amicus Curiae in support of the Petitioners, the Chickasaw Nation and the Choctaw Nation.

SUMMARY OF ARGUMENT

The Respondent United States, on behalf of its agency, the Internal Revenue Service ("IRS"), asks this Court to exempt the IRS from the precepts of the Federal trust responsibility, so that it may assess tribal gaming enterprise pull-tab revenues used directly for tribal government operations and services that benefit tribal members. The position of the IRS that Indian tribes are subject to the Federal wagering and related occupational taxes under the Internal Revenue Code, Chapter 35, 26 U.S.C. §§ 4401 and 4411, is a throwback to the antiquated assimilation policies of the late nineteenth and early twentieth centuries. Such policies have been emphatically rejected by the United States Congress, the United States Courts,

and the President of the United States. More simply stated, the IRS position that Congress did not intend to treat Indian tribes like states for purposes of an express wagering tax exemption is contrary to the Federal policy of Indian self-determination. Courts "are not obligated in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan v. Itasca County*, 426 U.S. 373, 388 n.14 (1976).

The Muscogee Nation supports the position of the Chickasaw Nation and the Choctaw Nation that § 2719(d) of the Indian Gaming Regulatory Act, Pub. L. No. 100-497, Oct. 17, 1988, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701, *et seq.*) ("IGRA"), is ambiguous and subject to the special canons of construction pertaining to Federal statutes involving Indian tribes. These special canons of construction require that ambiguous Federal statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The Muscogee Nation's purpose in presenting this amicus brief to the Court is to discuss the historical reason for development of these special canons of construction and the continued significance of these rules to Indian tribes as they exist today. The Muscogee Nation further asserts that the decisions of the Tenth Circuit Court of Appeals below in *Chickasaw Nation v. United States*, 208 F.3d 871 (10th Cir. 2001), *cert. granted*, 121 S.Ct. 877 (2001) and in *Choctaw Nation v. United States*, 210 F.3d 389 (10th Cir. 2000), *cert. granted*, 121 S.Ct. 877 (2001),

which both ignored the ambiguity in § 2719(d) of IGRA and failed to apply the applicable canons of statutory construction favorable to Indian nations, is contrary to Congressional intent in its 1988 enactments of IGRA and amendments to the Indian Self-Determination Act, Pub. L. No. 93-638, January 4, 1975, 88 Stat. 2203 (codified at 25 U.S.C. §§ 450, *et seq.*) ("Indian Self-Determination Act"). The Tenth Circuit's failure to apply these canons of construction is contrary to the strong Federal policy of Indian self-determination established by the Executive Office and Congress, and recognized by this Court in numerous decisions.[3]

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[3] The Muscogee Nation will not address the question whether the wagering tax statute would abrogate rights guaranteed by Chickasaw Nation treaties. The Tenth Circuit addressed the question whether the guarantee of self-government contained in Chickasaw Nation treaties could reasonably be construed to constitute a tax exemption as to the wagering tax. The Tenth Circuit concluded that "a treaty provision must be more explicit than the one at issue to exempt an Indian tribe from Federal excise taxes." *Chickasaw Nation v. United States*, 208 F.3d at 885. This conclusion is not at issue in the present case. Although this decision is contrary to established Federal Indian law principles, *see Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968), the Chickasaw Nation and the Choctaw Nation have chosen not to assert their treaty rights in this appeal. The Muscogee (Creek) Nation accordingly retains its right to seek protection of its own individual treaty rights with regard to tax issues through the judicial process, including the opportunity to establish a complete evidentiary record and to fully brief treaty issues.

ARGUMENT

I. The Special Canons of Construction Concerning Ambiguous Federal Indian Legislation are Based on the Federal Trust Responsibility and Apply to Interpretation of § 2719(b) of the Indian Gaming Regulatory Act.

The Muscogee Nation agrees with petitioners that § 2719(d) of IGRA is ambiguous and that special rules of Indian statutory construction, which require an interpretation favorable to the Indian tribes, apply to this case. Application of these special canons of construction result in the conclusion that Congress did not intend to make the Federal wagering taxes applicable to Indian pull-tab operations, but instead intended to treat Indian nations like states for purposes of Federal wagering tax exemptions. *See Little Six, Inc. v. United States*, 210 F.3d 1361 (Fed. Cir. 2000), *petition for cert. filed*, 69 USLW 3497 (2001).

When IGRA was enacted on October 17, 1988, Congress was well aware that the canons of construction applicable to Federal laws affecting Indians are grounded in the Federal trust responsibility. Only twelve days before the enactment of IGRA, Congress enacted the 1988 amendments to the Indian Self-Determination Act of 1975, 25 U.S.C. §§ 450, *et seq.* Pub. L. No. 100-472, Oct. 5, 1988, 102 Stat. 2285. The 1988 amendments addressed a number of Congressional concerns about funding for Indian tribes, and also established the "Tribal Self-Governance Demonstration Project." *Id.* The House and Senate

Reports accompanying the 1988 Indian Self-Determination Act amendments discuss the significance of the Federal trust responsibility in relation to the rules of Indian statutory construction, as follows:

> The right of tribal self-government is further protected by the trust relationship between the Federal Government and Indian tribes. The concept of a federal trust responsibility to Indian people was fashioned gradually by the Federal courts. The concept first appeared in Chief Justice Marshall's opinion in *Cherokee Nation v. Georgia*. During the twentieth century the trust principles articulated in *Cherokee Nation v. Georgia* have been applied in many specific situations to establish and protect rights of Indian tribes and individuals. *Trust obligations define the required standard of conduct for federal officials and Congress.* Fiduciary duties form the substantive basis for various claims against the federal government for breach of its trust responsibility. *Even more broadly, federal action toward Indians as expressed in treaties, agreements, statutes, executive orders, and administrative regulations is construed in light of the trust responsibility. As a result, the trust relationship is one of the primary cornerstones of Indian law.*

H.Rep. No. 393 and S.Rep. No. 274, 100th Cong., 2nd Sess. (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2661-2662 (emphasis added) (citation omitted).

This Congressional acknowledgment that statutes must be construed in light of the trust responsibility was consistent with the following statement from the foremost authority on Federal Indian law regarding the significance of the trust responsibility to the canons of Indian statutory construction:

> The rules for construing federal statutes in Indian affairs have a pervasive influence in Indian law. The canons are variously phrased in different contexts, but generally they provide for a broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. *These canons play an essential role implementing the trust relationship between the United States and Indian tribes* and are involved in most of the subject matter of Indian law.

F. Cohen, *Handbook of Federal Indian Law*, 224-225 (1982).

Nearly a century ago, this Court emphasized that the special rule of construction for Indians is based on the guardian-ward relationship between the United States and Indian tribes as follows:

> . . . doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, *who are wards of the nation, and dependent wholly upon its protection and good faith*. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.

Choate v. Trapp, 224 U.S. 665 (1912) (emphasis added). More recently, this Court has stated that the canons of construction applicable in Indian law "are rooted in the unique trust relationship between the United States and Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985), *reh'g denied*, 471 U.S. 1062 (1985).

This Court has consistently recognized the Federal government's trust responsibility to Indian tribes. This

Court has held that Congress must carry out the Federal government's fiduciary responsibility to Indian tribes. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 555 (1974); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 85 (1977), *reh'g denied*, 431 U.S. 960 (1977). This Court has also recognized that the Executive Office must carry out the Federal government's fiduciary responsibility. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935), *reh'g denied*, 295 U.S. 769 (1935); *Cramer v. United States*, 261 U.S. 219, 232-33 (1923). The trust responsibility includes the responsibility to protect tribes' property rights and right to self-government. While Congress has the power "to control or manage Indian affairs," that power extends to "appropriate measures for protecting and advancing the tribe" and is further "subject to limitations inhering in a guardianship and to pertinent constitutional restrictions." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 (1980). In *United States v. Creek Nation*, 295 U.S. at 109-110, this Court stated:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. *But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions.* It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation

> for them; *for that "would not be an exercise of guardianship, but an act of confiscation."*

Id. at 109-110 (emphasis added) (citations omitted).

In its treatment of the Indian nations, and their property, the United States as trustee must be judged by the most exacting fiduciary standards. *See Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mason*, 412 U.S. 391 (1973). To accomplish beneficent objects with reference to Indian tribes that, "from their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them . . . there arises the duty of protection, and with it the power." *United States v. Rickert*, 188 U.S. 432, 437-438 (1903), *citing United States v. Kagama*, 118 U.S. 375, 384 (1886). "So that if they may be taxed, then the obligations which the Government has assumed in reference to these Indians may be entirely defeated." *Id.* at 438. "The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create." *United States v. Rickert*, 188 U.S. 432, 439 (1903).

In the present case, where the issue is whether the United States, the guardian, intended to tax the gaming revenues of its wards, it is necessary to apply the special rules of Indian statutory construction which arose from that guardian-ward relationship. "[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." *See Squire v. Capoeman*, 351 U.S. 1 (1956) (construing treaties and General Allotment Act to afford exemption from a Federal capital gains tax on income earned from sale of timber on individual Indian trust property). To the extent ambiguity in a Federal law

exists, the ordinary canons of construction applicable in tax cases requiring strict construction of tax exemptions, shall be reversed in cases involving Indians (*See* Petitioners' Brief at 15-20). Absent an express provision in the IGRA requiring such taxation, and in light of the ambiguity of § 2719(d) (*See* Petitioners' Brief at 12), the guardian-ward relationship mandates that § 2719(d) must be construed in favor of the Indian tribes.

II. The Application of the Special Canons of Construction to Interpretation of § 2719(d) Is Consistent with the Overriding Federal Interest in Indian Self-Determination

A. Executive Office and Congressional Policy of Indian Self-Determination

For more than three decades, the Executive branch has advocated a policy of Indian Self-Determination. President Nixon stated that the United States "acts as a legal trustee for the land and water rights of American Indians" and has a "legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill." Exec. Order No. 11,399, 33 Fed. Reg. 4245 (1968). President Reagan established that it is part of the Executive branch's policy that self-government should include reduction of tribal dependence on non-federal funds. *See* President's Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983). More recently, President Clinton acknowledged the Government's unique relationship with Native American tribal governments and required that each executive department or agency operates within a "government-to-government" relationship

with federally-recognized tribal governments. Exec. Order No. 13,084, 63 Fed. Reg. 27,6555 (1998).

These Executive Office policies reflect legislative policy changes which began in the 1930's, when Congress halted the assimilation and allotment policy by enactment of the Indian Reorganization Act (IRA), Act of June 18, 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461, *et seq.*), and the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501, *et seq.*). These laws were enacted in order to provide a fresh start after decades of oppressive Federal administrative policies and actions. The IRA and OIWA ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds. The IRA and OIWA were part of the government's new policy encouraging the Indian Nations' economic development and self-determination. *See* F. Cohen, *Handbook of Federal Indian Law*, 144-152 (1982). This Court has described the IRA as reflecting "a change in policy, the theory of which is that Indians can better meet the problems of modern life through corporate, group, or tribal action, rather than as assimilated individuals." *Board of County Commissioners v. Seber*, 318 U.S. 705, 716 n.20 (1943), *reh'g denied*, 319 U.S. 782 (1943).

In 1975 Congress enacted the Indian Self-Determination Act, Pub. L. No. 93-638, January 4, 1975, 88 Stat. 2203 (codified in 25 U.S.C. §§ 450, *et seq.*), which authorized the Secretary of the Interior to enter into contracts with Indian tribes to plan, conduct and administer certain programs that the Secretary is authorized to administer for the benefit of Indians. *See* 25 U.S.C. § 450f. In the Act's

policy statement, Congress declared its commitment to maintenance of the Federal government's unique and continuing relationship with and responsibility to the Indian people, through the establishment of a meaningful Indian self-determination policy. 25 U.S.C. § 450a(b). This commitment to Indian self-government was also reflected in other enactments during this same time period. *See* Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, Sept. 30, 1976, 90 Stat. 1400 (codified at 25 U.S.C. §§ 1601, *et seq.*); Indian Financing Act of 1974, Pub. L. No. 93-362, Apr. 12, 1974, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451, *et seq.*).

During the past decade, Congress has continued to protect the strong Federal policy of tribal self-government and Federal trust responsibility. *See* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, Oct. 26, 1996, 110 Stat. 4017 (codified at 25 U.S.C. §§ 4101, *et seq.*); American Indian Agricultural Management Act of 1993, Pub. L. No. 103-177, Dec. 3, 1993, 107 Stat. 2011, (codified at 25 U.S.C. §§ 3701, *et seq.*); Indian Energy Resources Act of 1992, Pub. L. No. 102-486, Title XXVI, §§ 260, *et seq.*, Oct. 24, 1992, 106 Stat. 3113, (codified at 25 U.S.C. §§ 3501, *et seq.*); Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, Dec. 3, 1993, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601, *et seq.*); and Indian Employment Training and Related Services Demonstration Act of 1992, Pub. L. No. 102-477, Oct. 23, 1992, 106 Stat. 2302 (codified at 25 U.S.C. §§ 3401, *et seq.*).

The enactment of amendments to the Indian Self-Determination Act in 1994 are particularly important to Indian tribes. Pub. L. No. 103-413, October 25, 1994, 108

Stat. 4272. These amendments made the 1988 Tribal Self-Governance Demonstration Project a permanent program. *See* 25 U.S.C. §§ 458aa, *et seq*. The legislative history of the 1994 amendments demonstrates that Congress continues to recognize the unique trust responsibility to Indian nations and the importance of tribal self-governance, as follows:

> Conceptually, Self-Governance reflects the unique relationship between the United States Government and the individual Indian Tribes. Self-Governance recognizes that Tribes are governments with the inherent rights to govern themselves. The Tribal Self-Governance Project was designed to reduce Federal control over decision-making, and to enhance fiscal control, resource allocations, and management at the tribal level.
>
> * * *
>
> The Committee intends the trust responsibility of the United States to Indian Tribes and Indian individuals to be preserved. Self-Governance requires an orderly transition from Federal domination of programs and services benefitting Indians to tribal authority and control over those benefits with an accompanying reduction in the Federal bureaucracy.
>
> A new chapter in Federal-Indian relations is being written by Tribal Self-Governance. Indian Tribes have been and will continue to be permanent governmental bodies *exercising basic powers of government, as of Federal and State governments,* to help meet the needs of their citizens.

S.Rep. No. 103-205, 103rd Congress, 1st Sess. 3, 4, *reprinted in* 1994 U.S.C.C.A.N. 3488 (emphasis added).

These enactments by Congress demonstrate the necessity of the continuing judicial recognition of the United States' Federal trust responsibility to Indian nations and the importance of Indian self-government, including application of special rules of statutory construction to the interpretation of ambiguous Federal laws impacting the rights of Indian tribes and potentially affecting the ability of tribes to effectively raise revenues for tribal government operations and services.

B. Judicial Adherence to the Federal Policy of Indian Self-Determination.

The Internal Revenue Service presupposes the general applicability of their tax code to Indian Nations and places the burden of proving exemption from the tax code upon the Indian Nations. The Internal Revenue Service looks to the United States as the source of Indian sovereignty, assuming that Indian Nations are automatically within their jurisdiction. This is a false assumption. The United States has long recognized that the Indian Nations pre-existed the formation of the United States, and that their powers derive not from the creation of the Federal government or its constituent States, but from the inherent sovereignty of the Indian Nations which, although limited by conquest, exist in their free and unfettered form unless Congress has explicitly and with the clearest language, removed that power. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *United States v. Wheeler*, 435 U.S. 313 (1978). Indian Tribes have retained many of the powers of self-government that they possessed at the time of their

incorporation into the United States. As stated in *Worcester v. Georgia*, 31 U.S. at 580 (M'Lean, concurring), "[a]t no time has the sovereignty of the country been recognized as existing in the Indians, but they have always been admitted to possess many of the attributes of sovereignty. All the rights which belong to self-government have been recognized as vested in them."

This Court has repeatedly reaffirmed the basic principles originally set forth in the nineteenth century in the *Cherokee Nation* and *Worcester* cases. *See, e.g., Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172 (1973), *quoting United States v. Kagama*, 118 U.S. 375, 381-382 (1886). The sovereignty retained by tribes includes the power of regulating their internal and social relations. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), *quoting United States v. Kagama*, 118 U.S. at 381-382 (1886). This authority includes the tribes' power to make their own substantive law in internal matters and to enforce that law in their own forums, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978).

Only a year before passage of IGRA, this Court recognized in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), that tribal self-government includes the right to engage in economic activity in Indian country through means that specifically include the right to conduct gambling. In *Cabazon*, this Court considered the issue whether Indian tribes are subject to state regulatory prohibition of

gaming in Indian country in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Mission Band of Indians*, 480 U.S. at 216, *citing Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983). The Court concluded that Indian tribes are not subject to such regulation, and reaffirmed the basic rule concerning *state* taxation of Indian income from activities in Indian country set forth in the *Mescalero* case as follows:

> Even so, *in the special area of state taxation*, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. Arizona State Tax Comm'n* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent. *Ibid.*

California v. Cabazon Mission Band of Indians, 480 U.S. at 216 (emphasis added) (cite omitted).

In *Cabazon*, this Court emphasized the importance of the "number of statutes Congress enacted to promote tribal self-government," and found of particular significance the Congressional statements of policy in the Indian Financing Act of 1974, as amended, 25 U.S.C. §§ 1451, *et seq.* and the Indian Self-Determination Act of 1975, as amended, 25 U.S.C. §§ 450, *et seq. Id.* at 217 fn.19. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 509, this Court cited

Cabazon with approval and found that the Indian Financing Act of 1974 and the Indian Self-Determination Act reflect Congress's desire to promote the goal of Indian self-government, "including the overriding goal of encouraging tribal self-sufficiency and economic development." The Court further stated: "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* at 510.

Although the *Cabazon* and *Citizen Band Potawatomi* decisions did not involve construction of an ambiguous Federal statute, this Court's reliance on the strong Congressional expressions of policy regarding Indian self-determination in those cases is instructive. These decisions indicate that great weight also should be afforded to the self-determination policy when construction of ambiguities in Federal laws impacting tribal revenues, such as 25 U.S.C. § 2719(d), is involved. In light of the continuing self-determination policy, this Court should not be disposed to disturb the long-established canons of statutory construction which favor Indian tribes.[4]

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[4] Since the present case turns upon construction of IGRA, § 2719(d), it is not necessary to explore the assumption of the IRS that Indian tribes are not exempt from Federal taxes absent an express tax exemption. However, this view, apparently founded on cases involving taxation issues related to individual trust and restricted lands and special statutes pertaining thereto, such as *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935), is not applicable to Federal taxation of Indian tribes. In light of the Federal policy of self-determination and the numerous Federal laws enacted to facilitate Indian self-governance, the better rule is to require express Congressional authorization of Federal taxation of Indian tribes, just as such express Congressional authorization is required for state taxation of tribes. As discussed in more detail in part II.C. of this brief, the legislative history of IGRA indicates the Congressional view that if tribal rights are not explicitly abrogated in the language of IGRA, no such restrictions should be construed. When it enacted IGRA, Congress followed this rule that express authorization of taxation is required, by enacting a provision in IGRA which expressly provides that individual Indians (who under certain limited circumstances receive per capita payments from gaming revenues) are subject to Federal income taxes as ordinary income. 25 U.S.C. § 2710(b)(3)(D). Congress also followed the rule that an express authorization is required in order to assess costs against Indian nations, when it enacted § 2717(a)(1) of IGRA, which requires tribes to pay fees to subsidize the costs of the Federal Indian Gaming Commission based on gross revenues. There is nothing in IGRA expressly requiring Indian tribes to pay the Federal wagering tax. However, rather than addressing broader issues involving Federal tax liability of Indian tribes, the Muscogee Nation agrees with the Petitioners that the most appropriate way of resolving the instant case is to apply the special canons of Indian statutory construction in the interpretation of § 2719(d).

C. Statutory Construction of IGRA § 2719(d) in the Context of Indian Self-Determination

Indian tribes exercise the governmental function of raising revenues through their gaming enterprises. The sale of pull-tabs by Indian tribes is a business of receiving wagers that generates significant revenue necessary to carry out the tribes' official governmental responsibilities. The wagering occupational tax is a tax on the business of receiving wagers. *See* 26 U.S.C. § 4411. If the ambiguity in § 2719(d) of IGRA is not resolved in favor of the tribes, resulting in imposition of a direct tax on the tribes' official governmental activities, tribes will lose

revenue needed to carry out their official governmental responsibilities. Reducing the revenue of Indian tribes interferes with the tribes' ability to exercise self-government. Self-determination and economic development are not within reach if tribes cannot raise revenues and provide employment for their members. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 218-19.

IGRA, 25 U.S.C. § 2710(b)(2)(B), allows tribal expenditure of tribal gaming net revenues only for the following purposes: to fund tribal government operations or programs, to provide for the general welfare of the Indian tribe and its members, to promote tribal economic development, to donate to charitable organization and to help fund operations of local government agencies.

Consistent with this requirement, gaming revenues are used for programs which have historically suffered from significant neglect and under funding by the Federal government. *Report of National Gambling Impact Study Commission*, 104th Cong., 2nd Sess, Chapter 6, Native American Tribal Gambling, 6-6. Gaming revenues are used to support tribal governmental services such as tribal courts, fire protection, law enforcement, water, sewer and solid waste, roads, environmental health, land-use planning and building inspection services, and natural resource management. *Id.* Tribes also use gambling revenues to establish and enhance social welfare programs in the areas of education, housing, substance abuse, suicide prevention, child protection, burial expenses, and youth recreation. *Id.* Tribes have used gaming funds to support the establishment of other economic ventures that will diversify and strengthen the reservation economies. *Id.* Gambling revenues are also used to

support tribal language, history, and cultural programs. *Id.* Gaming enterprises employ tribal members, resulting in drops in high unemployment rates in many Indian communities and a reduction in welfare rolls and other governmental services for the unemployed. *Id.*

The gaming enterprises of Indian tribes are owned, governed, and controlled by the tribes. The imposition of any tax upon tribal enterprises would increase the total cost of playing the games and, by imposing collection, remittance, and record-keeping requirements, would be burdensome upon the tribes. The United States' only interest in imposing such a tax is raising Federal revenue. An interest in raising revenue alone is insufficient to justify taxing this tribal activity. *See Indian Country U.S.A., Inc. v. Oklahoma Tax Commission*, 829 F.2d at 986. The competing sovereign's interest is "particularly minimal when it seeks to raise revenue by taking advantage of activities that are wholly created and consumed within tribal lands and over which it has no control." *Indian Country U.S.A. v. Oklahoma Tax Commission* at 987; *see also Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 174 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 343.

There is nothing in IGRA indicating that Congress intended to interfere with the tribal exercise of the governmental function of raising tribal revenue. The ambiguity in § 2719(a) should therefore be resolved in favor of Indian tribes. This view is supported by the legislative history of IGRA. During debate of IGRA a month before its passage, Senator Evans, Vice Chairman of the Senate Committee on Indian Affairs, stated that the bill "was drafted with the full understanding of the principles of

law which guide our relationship with the Indian tribes." He further stated:

> Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. *Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed.* This act should not be construed as a departure from established principles of the legal relationship between the tribe and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, *including the basic principles set forth in the Cabazon decision.*

134 Cong. Rec. 24027 (September 15, 1988) (Statements of Senator Evans) (emphasis added). This statement regarding the intent of Congress was mirrored by the following statement made by Chairman Udall:

> I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

134 Cong. Rec. 25377 (September 26, 1988) (Statements of Representative Udall).

In light of Congress's recognition of the overriding Federal interest in promoting Indian self-determination, this Court should apply the special canons of statutory construction applicable to ambiguous Federal legislation, which will result in the conclusion that the Federal wagering tax does not apply to tribal pull-tab operations.

III. The 1988 Indian Gaming Regulatory Act Must Be Considered *In Pari Materia* With the 1988 Amendments of the Indian Self-Determination Act.

The Indian Gaming Regulatory Act was enacted by Congress on October 17, 1988, only twelve days after enactment of the 1988 Indian Self-Determination Act amendments. Pub. L. No. 100-472, Oct. 5, 1988, 102 Stat. 2285. Construction of § 2719(d) of IGRA must therefore be considered in light of the overall legislation plan contained in both IGRA and the 1988 Indian Self-Determination Act amendments. When Congress passes a law affecting Indian tribes, and the same Congress enacts a second law affecting Indian tribes two months later, the two laws must be considered *in pari materia*, and the overall legislative plan must be considered. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 410-411 (1968); *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 390 (1976). The application of the rule of *in pari materia* makes the most sense when statutes were enacted by the same legislative body at the same time. *See Elernbaugh v. United States*, 409 U.S. 239, 243-244 (1972).

In the 1988 amendments of the Indian Self-Determination Act, Pub. L. No. 100-472, Congress amended its declaration of policy in 25 U.S.C. § 450a by adding a sentence at the end of sub-section (b), as follows (emphasis added):

> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to

the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments,* capable of administering quality programs *and developing the economies of their respective communities.*

One of the primary objectives of the 1988 amendments was the inclusion of indirect costs in funding provided to tribes under the Indian Self-Determination Act. According to the House and Senate Reports, attempts to transfer Federal funds to tribes had been complicated by difficult Federal budget pressures of the past decade, resulting in competition between Federal agencies and tribes for "the same Federal funds to carry out their respective responsibilities." 1988 U.S.C.C.A.N. 2626. The failure of Federal agencies to reimburse tribes for the cost of program operations resulted in a "tremendous drain on tribal financial resources." *Id.* According to the House and Senate Reports:

> The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems

> and other administrative requirements. Tribal funds derived from trust resources, *which are needed for community and economic development,* must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. *Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.*

1988 U.S.C.C.A.N. 2627 (emphasis added).

The Report states that it "is clear that tribal contractors are carrying out federal responsibilities." *Id.* at 2645. It further states that actions by Federal agencies to reduce tribal contract funding to pay for various enumerated Federal expenses "frustrate the intent of the Indian Self-Determination Act and are contrary to the purpose of the Act." *Id.* at 2649. "The intent of these amendments is to protect and stabilize tribal programs by protecting and stabilizing the funds for those programs from inappropriate administrative reduction by Federal agencies." *Id.* The Report concludes: "These amendments strengthen the ability of tribes to contract with the Secretary to perform trust-related functions, and to participate with the Secretary in trust responsibility decision-making as equal partners." *Id.* at 2659. Congress addressed the future shortfall with regard to indirect costs by including a new definition of the term "indirect costs" in 25 U.S.C. § 450b(f) and by adding a new § 450j-1, entitled "Contract funding and indirect costs" in the 1988 Indian Self-Determination Act amendments.

Consistent with the policy statements of the 1988 Indian Self-Determination amendments enacted only twelve days before enactment of IGRA, Congress included findings in IGRA that: " . . . a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and also found that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. 25 U.S.C. § 2701. Congress further stated its intent in IGRA, to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

The interpretation of § 2719(d) of the IGRA proposed by the IRS is not consistent with the overall legislative plan for strengthening Indian self-government established by Congress in 1988. The policy statements in the two 1988 Acts emphasize the importance of Indian self-determination. The 1988 Indian Self-Determination Act amendments were directed at providing a remedy for Congressional concern that Indian tribes were not being sufficiently funded to carry out Federal trust functions under the Indian Self-Determination Act and that they were forced to use tribal resources to help pay for Federal trust functions. It simply does not make sense that twelve days after enacting a law designed to afford tribes greater self-determination by providing indirect cost funding for carrying out Federal trust functions, Congress could have

intended to further the United States' interests in raising revenues at the expense of tribes by imposing the Federal wagering tax on tribal pull-tab revenues. It cannot be assumed that in enacting IGRA, Congress performed such a useless act.[5] Courts should give effect to both of two statutes covering related or overlapping subjects. *See Boys Markets v. Retail Clerks Union, Local 770*, 398 U.S. 235, 249-50 (1970). In order to give effect to the 1988 Self-Determination Act amendments and to give effect to § 2719(d) of IGRA, this Court must conclude that tribal pull-tab proceeds are not subject to the Federal wagering and occupational taxes.

CONCLUSION

The Internal Revenue Service's focus on regulation for purposes of raising Federal revenue is contrary to the Federal Government's commitment to a policy of Indian

[5] In *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000), the Ninth Circuit considered whether Congress intended to allow the Johnson Act, 15 U.S.C. §§ 1171-1178, which prohibits the possession and operation of any Class III gambling device on Indian land unless authorized by a tribal-state compact, to apply to bingo aids when it enacted IGRA. The Court concluded that reading the Johnson Act to forbid such aids would render § 2703(7)(A)(i) of IGRA, which provides that bingo using "electronic, computer, or other technologic aids" is class II gaming, a nullity. The Court asked why Congress would carefully protect such technologic aids in § 2703(7)(A)(i) of IGRA, "yet leave them to the wolves of a Johnson Act forfeiture action." The Court found that it could not presume that in enacting IGRA, Congress performed such a "useless act." *Id.* at 1102.

self-determination and economic self-sufficiency. The guardian has a responsibility to protect the property of the wards so that it will adequately serve the wards' needs and finally bring them to a state of independence. Interpretation of an ambiguous Federal statute to allow taxation of the wards for the benefit of the guardian is inconsistent with the Federal trust responsibility and the Federal policy of Indian self-determination.

Respectfully submitted,

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